

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

MARTHA A. FAGG,)	CASE NO. 5:12CV4029
)	
Plaintiff,)	
)	
vs.)	MEMORANDUM
)	AND ORDER
ERIC H. HOLDER, JR.,)	
ATTORNEY GENERAL)	
OF THE UNITED STATES,)	
)	
Defendant.)	

Stephanie Rose, then 36 years of age, was sworn in as the United States Attorney for the Northern District of Iowa on November 24, 2009. In February 2010, plaintiff Assistant United States Attorney Martha Fagg received a “successful” rating on her performance review for 2009, and the review was signed and dated by Rose. One month later, in March 2010, Fagg, then 53 years of age, wrote a memorandum to Rose expressing concerns about Rose’s replacement of the office’s Civil Chief (who was 60 years old) with 35-year-old Teresa Baumann and statements Rose had allegedly made about office retirements and a “succession plan.” Fagg’s memorandum stated that Rose’s actions and statements “could be construed as discriminatory,” “could be a prima facie case of both direct and indirect age discrimination,” and “may be construed to be hostile to individuals in this office over the age of 40 and beyond.” (Filing 56-4 at CM/ECF p. 43.)

The evidence indicates that soon after sending this memorandum to Rose, Fagg experienced a heightened level of scrutiny of her work, surveillance, an audit of her past case files, a letter of reprimand, proposed suspensions, leave restriction notices, a temporary and proposed permanent transfer to another office approximately 250 miles away from her home, and ultimately termination from her 13-year employment.

During this time frame, Fagg experienced health problems necessitating hospitalization, anxiety and blood-pressure medication, therapy sessions, and a driving restriction.

Fagg filed this action in March 2012, alleging two causes of action. First, Fagg claims that the defendant violated the Age Discrimination in Employment Act (“ADEA”)¹ by terminating her employment because of her age and retaliating against her for engaging in conduct protected by the ADEA. Second, Fagg claims that the defendant violated the Americans with Disabilities Act, as amended,² and the Rehabilitation Act of 1973³ because the actions taken against her did not reasonably accommodate her known mental and physical impairments.

The defendant has filed a motion for summary judgment (Filing 49), and the parties have filed the following evidence in support of, and in opposition to, the motion:

**DEFENDANT'S APPENDIX IN SUPPORT
OF MOTION FOR
SUMMARY JUDGMENT (Filing 49-2 to 49-9)**

- | | |
|-----------|--|
| Exhibit 1 | Complaint |
| Exhibit 2 | Answer |
| Exhibit 3 | Forms SF50s for Martha Fagg |
| Exhibit 4 | Germaine excerpts of the deposition transcript of Martha Fagg |
| Exhibit 5 | Germaine excerpts of the deposition transcript of Teresa Baumann |
| Exhibit 6 | Germaine excerpts of the deposition transcript of Stephanie Rose |
| Exhibit 7 | Germaine excerpts of the Sworn EEO statement of Stephanie Rose |
| Exhibit 8 | Intra-office e-mails and memoranda |
| Exhibit 9 | Germaine excerpts of the deposition transcript of Larry Kudej |

¹29 U.S.C. §§ 621 *et seq.*

²42 U.S.C. §§ 12101 *et seq.*

³29 U.S.C. §§ 701 *et seq.*

- Exhibit 10 2010 Organization Chart for the Northern Iowa U.S. Attorneys Office
- Exhibit 11 Germaine excerpts of answers to Fagg's interrogatories (redacted)
- Exhibit 12 Germaine excerpts of the Foundations of Leadership Documents
- Exhibit 13 Germaine excerpts of the deposition transcript of Michelle Schwebach
- Exhibit 14 Germaine excerpts of the deposition transcript of Kevin Fletcher
- Exhibit 15 Summary of pre-2004 attendance and conduct complaints against Martha Fagg
- Exhibit 16 Germaine excerpts of the deposition transcript of Tim Duax
- Exhibit 17 Fagg's responses to the First Set of Requests to Admit
- Exhibit 18 Letter of Reprimand
- Exhibit 19 Germaine excerpts of the Larry Kudej's 2010 Performance Work Plan
- Exhibit 20 Larry Kudej's draft outline concerning civil succession and continuity
- Exhibit 21 Travel reimbursement sheets for Martha Fagg
- Exhibit 22 E-mail from Stephanie Rose stating office priorities and goals
- Exhibit 23 EARS-related documents
- Exhibit 24 March 9, 2010 "Concerns" memo
- Exhibit 25 Sworn EEO statement of Grant Johnson
- Exhibit 26 Sworn EEO statement of Jill Julian
- Exhibit 27 Court order in *Kluver v. Kluver*
- Exhibit 28 Letter from Office of Professional Responsibility
- Exhibit 29 EEO formal complaints
- Exhibit 30 60-day transfer letter
- Exhibit 31 Germaine excerpts of St. Luke Medical Center and Michele Boykin medical records
- Exhibit 32 Fax from Dr. Barto
- Exhibit 33 DOJ Form 100A Request for Reasonable Accommodation
- Exhibit 34 Germaine excerpts of Martha Fagg's USA-5 report
- Exhibit 35 Notice of proposed 7-day suspension (without attachments)
- Exhibit 36 Notice of Management Directed Assignment
- Exhibit 37 Decision letter on 7-day suspension
- Exhibit 38 DOJ Form 100A Request for Reasonable Accommodation
- Exhibit 39 Denial of DOJ Form 100A Request for Reasonable Accommodation
- Exhibit 40 Notice of proposed 14-day suspension (without attachments)
- Exhibit 41 Fagg's responses to the First Set of Requests to Admit
- Exhibit 42 Germaine excerpts of the deposition transcript of Shannon Olson
- Exhibit 43 Decision letter on 14-Day Suspension
- Exhibit 44 Notice of proposed removal (without attachments)
- Exhibit 45 Removal decision Letter

- Exhibit 46 Germaine excerpts of the deposition transcript of Grant Johnson
 Exhibit 47 Agency affidavit

**PLAINTIFF'S APPENDIX IN SUPPORT OF
 RESISTANCE TO DEFENDANT'S MOTION
 FOR SUMMARY JUDGMENT (Filings 56-4 & 59-1)**

Plaintiff's 2007 Review	1
Plaintiff's 2008 Review	7
Rose Email re: Baumann Hiring	14
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Baumann emails re: Dog Trip	21
Plaintiff's 2009 Review	26
Fagg email re: Dog Trip	32
Murphy Notes re: Voter Information	35
Rose emails re: Response to Memo	37
Rose email re: Fagg Memo	39
Fagg email re: OPR Referral	42
Barto Work Release	48
May, 2010 OPR Letter	49
Baumann email re: No Praise in Office	50
McNamar memos re: June 10, 2010 Accident	51
Medical Release.....	56
Fagg Discharge Instructions	57
Rose email re: Kudej EARS Evaluation	58
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Baumann EEO Testimony	87
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Kudej Deposition Excerpts	103
Serio Deposition Excerpts	113
Worthington Deposition Excerpts	117
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Wright Declaration	157
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Kudej Recommendations	168
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**PLAINTIFF'S SEALED APPENDIX IN
SUPPORT OF HER RESISTANCE TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT (Filing 58)**

[SEALED]	1
[SEALED]	2
[SEALED]	11
[SEALED]	25
[SEALED]	29
[SEALED]	31
[SEALED]	38
[SEALED]	39
[SEALED]	40
[SEALED]	46
[SEALED]	49
[SEALED]	51
[SEALED]	52
[SEALED]	56
[SEALED]	58
[SEALED]	62
[SEALED]	64
[SEALED]	66
[SEALED]	67
[SEALED]	68
[SEALED]	72

[SEALED]	76
[SEALED]	79
[SEALED]	85
[SEALED]	86

DEFENDANT'S SUPPLEMENTAL APPENDIX
IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT (Filing 67-1)

Pages 1-3	Gov. Appendix 260-262
Page 4	January 2, 2010 form SF-50 for Fagg
Pages 5-10	Germaine excerpts of the deposition transcript of Stephanie Rose
Pages 11-12	Affidavit of Stephanie Rose
Pages 13-14	January 4, 2010 e-mail and leave slip
Pages 15-17	Germaine excerpts of the deposition transcript of Larry Kudej
Pages 18-21	Germaine excerpts of the deposition transcript of Martha Fagg
Pages 22-24	Germaine excerpts of the deposition transcript of Tim Duax
Pages 25-28	Germaine excerpts of the deposition transcript of Teresa Baumann
Pages 29-31	Germaine excerpts of the deposition transcript of Grant Johnson
Pages 32-38	E-mails regarding DOJ approval to subpoena Attorney Serio
Pages 39-45	Subpoena and corresponded for Attorney Serio
Pages 46-48	Germaine excerpts of the deposition transcript of attorney Robert Serio
Pages 49-63	Germaine attachments to 14-day suspension letter
Page 64	March 24, 2009 Kudej Kudo
Page 65	March 4, 2010 e-mail re: issues with Fagg's <i>Kluver</i> settlement proposal
Page 66-68	Germaine excerpts of the deposition transcript of Kimya Jones

Suffice it to say that there are genuine issues of material fact precluding the entry of summary judgment, most importantly with regard to Defendant's motives in taking adverse employment actions against Martha Fagg.⁴ While the defendant has

⁴Defendant argues that Fagg's response to the defendant's motion for summary judgment is deficient and fails to comply with the Local Rules. (Filing 67-2 at CM/ECF p. 4.) While Plaintiff's submissions are not technically compliant in all

filed evidence indicating that Fagg may have violated office policy and procedure prior to being disciplined and ultimately terminated, there is a genuine issue of material fact regarding whether the defendant's stated reasons for firing Fagg were a pretext for retaliation and discrimination. Further, Fagg has produced sufficient evidence to put witness credibility at issue.⁵ *Johnson v. Securitas Sec. Services USA, Inc.*, ___ F.3d ___, 2013 WL 4504589 (8th Cir. 2013) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict." (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986))).

Accordingly,

IT IS ORDERED that the defendant's motion for summary judgment (Filing 49) is denied.

DATED this 10th day of October, 2013.

BY THE COURT:
s/ *Richard G. Kopf*
Senior United States District Judge

respects, the substance of what is required by the Local Rules is contained in Plaintiff's submissions and, in any event, the Local Rules "are subject to modification in any case at the discretion of the presiding judge." LR 1(d), Local Rules of the United States District Courts for the Northern and Southern Districts of Iowa (rev. Dec. 1, 2009).

⁵See, for example, Filing 56-4, Depo. Testimony of Stephanie Rose, at CM/ECF p. 132 ("Martha made a lot of stuff up. . . . Like the whole lawsuit. . . . The [March 2010] memo [Fagg] wrote was completely untrue. She lied to us frequently about where she was. She lied about how things had happened. She lied to EEO. She lied, I assume, to you guys. She lies.").